U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: EAC 01 187 53294 Office: VERMONT SERVICE CENTER Date: JAN 29 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an automobile repair firm. It seeks to employ the beneficiary permanently in the United States as an automobile mechanic. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 31, 1996. The beneficiary's salary as stated on the labor certification is $17.77 per hour or $36,961.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. In a request for evidence (herein I-797) of September 9, 2001, the director required details of the source from which the

petitioner intended to pay the proffered wage in addition to evidence already submitted.

Counsel submitted the petitioner's lease for business space, his personal life insurance policy, and an approval notice dated August 18, 1998 in respect to one Morgana, said to be "the worker being substituted with the beneficiary." Counsel added that no petition had been filed for one Fuentes.

The director observed that the approval of the prior petition may have been in error and determined that the lease and life insurance policy were inappropriate ways to meet a payroll and establish that the petitioner had the ability to pay the proffered wage. The director denied the petition.

On appeal, counsel submits the petitioner's affidavit and business plan of April 3, 2002 to the effect that he will reduce his employment to about 20% and increase the beneficiary's wages to $35,125, equal to about 80% of the time. The attached business plan projected mean future income of $36,250 for the beneficiary, less than the proffered wage, $36,961.60.

The offers of proof are not persuasive. The adjusted gross income on the petitioner's 1996, 1997, 1999, and 2000 Forms 1040 U.S. Individual Income Tax Return show no significant amounts after the owner's personal income from which to pay the proffered wage.

Counsel's brief on appeal states,

> ... the petitioner's representative will only be at the place of employment in an oversight capacity and only 20% of the time. The division of the business income on average from the last three (3) years and with a calculated increase in business of ONLY 5% would allow the petitioner to pay the beneficiary [redacted] in excess of $37,125 as well as paying in excess of the proffered salary.

Counsel speaks ambiguously, in the response to the I-797, of "Morgana, the worker being substituted with the beneficiary". On appeal, the brief argues that the consideration of the beneficiary's potential to increase the petitioner's revenues by five percent (5%) is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers.

Counsel only claims that his assumptions to produce $37,125 of projected income are "effectively within the showing of the proffered wage."

The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I & N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I & N Dec. 503, 506 (BIA 1980).

In any event, funds already expended at the priority date are not available to satisfy the wage. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability continuing until the beneficiary obtains lawful permanent residence. *See* Matter of Great Wall, 16 I & N Dec. 142, 145 (Acting Reg. Comm. 1977); Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); Chi-Feng Chang v. Thornburgh, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. 204.5(g)(2). 8 C.F.R. 103.2(b)(1) and (12).

The reliance on bank statements for 1997 and 1998 was misplaced. No balance exceeded $1,400, less than the proffered wage. Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the proffered wage, there is no evidence that they somehow show additional funds beyond those of the tax returns and financial statement. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I & N Dec. 190 (Reg. Comm. 1972).

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.